In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 782

CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD., a corporation, CENTRAL CALIFORNIA RETAIL GROCERS & MEAT DEALERS ASSOCIATION, a corporation, CENTRAL COAST COUNTIES ASSOCIATION OF RETAIL GROCERS, INC., a corporation, FOOD TRADES INSTITUTE, INC., a corporation, FOOD INDUSTRY BUREAU, INC., a corporation, KERN COUNTY RETAIL GROCERS & MERCHANTS ASSOCIATION, a corporation, RETAIL GROCERS ASSOCIATION OF ALAMEDA COUNTY, a corporation, RETAIL GROCERS ASSOCIATION OF SAN FRANCISCO, LTD., a corporation, TULARE-KINGS RETAIL GROCERS ASSOCIATION, CONTRA COSTA COUNTY RETAIL GROCERS ASSOCIATION, YOSEMITE EMPIRE RETAIL GROCERS ASSOCIATION, SONOMA COUNTY RETAIL GROCERS ASSOCIATION, FRESNO COUNTY RETAIL GROCERS ASSOCIATION, WILLIAM D. HADELER, F. A. TISSIER, F. H. McFARLAND, A. H. ROLFES, GRACE GASPAR, J. N. SHOULTS, W. C. MILLER, FRED VERLEGER and I. H. WALLACE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of

Appeals for the Ninth Circuit (R. 1112), affirming judgments of the United States District Court for the Northern District of California, Southern Division (R. 864-886).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1097-1112) has not yet been reported. The District Court rendered no formal opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1943 (R. 1113). A timely petition for rehearing was filed January 25, 1944, and denied February 16, 1944 (R. 1113). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

QUESTIONS PRESENTED

Two questions are involved:

(1) Does associated activity for the bona fide purpose of enforcing a *State Unfair Practices Act* (specifically, the *California Unfair Practices Act*), not going beyond that Act, violate the Sherman Antitrust Act?

(2) Where the defendants' activities are wholly local and intrastate, are directed only to intrastate distribution and do not in any way impair or diminish the flow of groceries into the state, and where the purpose and objective are to affect the retail price of groceries sold within the state to consumers by local

retailers, with no intent to restrain interstate commerce, is interstate commerce involved so as to bring the case within the purview of the Sherman Act, merely because some groceries have come into the state from without, first coming to rest within the state in central warehouses or on retailers' shelves before the retail sales?

Shortly stated, is a retail sale of groceries from the retailer's shelves to the ultimate consumer still in the "stream of interstate commerce"?

STATUTES INVOLVED

The statutes involved are:

(1) Section 1 of the *Sherman Antitrust Act* (15 U.S.C., Sec. 1), viz.:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *."

(2) *State Unfair Practices Acts;* specifically, the *California Unfair Practices Act* (Stats. 1935, Ch. 477, p. 1546; amended by Stats. 1937, Ch. 860, p. 2395; Stats. 1939, Ch. 175, p. 1424; distributed, by Stats. 1941, Ch. 526, p. 1847, throughout Ch. IV of California Business and Professions Code).

This Act is set out in the Appendix. Briefly:—it illegalizes (a) the sale of any goods below cost plus cost of doing business with intent to injure competitors or destroy competition, and (b) loss-leader sales, defined as sales below cost to encourage purchase of other articles or which divert trade from others (Section 3). Violations are misdemeanors, may also be enjoined in a civil action, and are the basis of civil actions for

damages. The Act provides that it may be enforced by trade associations (Section 10),[1] that intent to injure a competitor is presumed from evidence of a sale below cost plus the fact that a competitor is injured, and that cost surveys in a trade are competent evidence in determining whether a sale is below cost (Section 5).

STATEMENT OF THE CASE

The petitioner California Retail Grocers & Merchants Association, Ltd. is a long-established trade association of independent (non-chain) retail grocers in Northern California. The other petitioners are affiliated local retail grocers' associations (representing about 1,500 independent retail grocers in Northern California), and officers of the various associations.

Petitioners were indicted for a conspiracy to fix retail prices of groceries sold in Northern California by retail grocers there located, in alleged violation of Section 1 of the Sherman Act (Indictment, para. 22; R. 12). Apart from the issue of interstate commerce, their defense was that they had merely associated together for the purpose of enforcing the State Unfair Practices Act in the retail grocery trade in Northern California. A jury having been waived, petitioners were tried and convicted by the court. The Circuit Court of Appeals affirmed the convictions.

Although the indictment had been couched in general language susceptible of being construed as charging that the petitioners had gone beyond and outside the Unfair Practices Act, government counsel decided to use the case as a test case by which to obtain a decision that *mere associated enforcement*

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1. The purpose of this section was to permit the trades to be policed under their respective trade associations in California. E. T. Grether, "*Legislation Restricting Price Cutting*," 24 Cal. Law Rev., at 647.

of the State Unfair Practices Act in and of itself violated the Sherman Act. In short, they contended that the defense was insufficient, not in point of fact, but in point of law. Several months previously, under a somewhat similar indictment in the Southern District of California against a different group of associations operating in that area, the government had chosen to present its case on the theory that the defendants there had not in fact sought to enforce the State Act but had gone outside of it. The District Court (Yankwich, D. J.) there stated by way of dictum that bona fide enforcement of the State Act would not violate the Sherman Act, but it convicted the defendants on a finding of fact, in accordance with the government's contention, that they had engaged in a price-fixing conspiracy without regard to the limitations of the State Act. (*United States v. Food and Grocery Bureau, etc., et al.,* 43 F. Supp. 966, 43 F. Supp. 974). Having succeeded on that moderate theory of law in the *Southern* case, the government here struck out on a bolder course and sought to establish the principle that an association only for the purpose of enforcing the State law, not going beyond it in any respect, necessarily violated the Sherman Act; and with this position the trial court agreed.

To this end, in direct contrast to the *Southern* case, the government made no attempt to offer evidence that the defendants had gone beyond the State law but rested its case upon proof of activities which substantially the petitioners admitted. Conversely, the government objected to evidence offered by petitioners to prove that they had merely acted in good faith to enforce the State law and had stayed within its confines. Much of this evidence was rejected when offered.[2] At

2. For example: R. 771-774; Def. Ex. U for Identification, R. 774-778, Assignment of Errors 46-47, R. 925-930; R. 608, Assignment of Error 49, R. 931; R. 733-734, Assignment of Error 78, R. 962; R. 673, Assignment of Error 58, R. 939; R. 680, Assignment of Error 60, R. 943; R. 688, Assignment of Error 62, R. 945; R. 764, Assignment of

the close of the case, in order to focus the issue even more sharply, the government moved to strike great quantities of the defendants' evidence, both oral and documentary, which had been received, and the motion was granted.[3]

Briefly, the record is only that petitioners had done what they admitted they had done. They had called mass meetings of grocers and had sent to them lists and bulletins, advising of the State Act, of cost surveys, and of retail prices below which it would be supposed that loss-leader and below-cost selling was being practiced, and informing the trade that such sales would be investigated and reported to the local district attorneys for inquiry and legal proceedings under the State law.

Severely summarizing, the evidence excluded and stricken included the following matters: the cost of doing business in the retail grocery trade in the pertinent areas of California; cost surveys made by petitioners under the State Act and cost surveys by State officials; evidence that petitioners' activities were carried out in reliance on these surveys, that petitioners acted in conjunction with, upon the advice and instructions of, and upon standards approved by, local district attorneys in enforcing the State law; evidence that sales below cost in the retail grocery trade always injure competitors, so that in every case of below-cost selling an inference of intent to injure competitors or competition is permissible; evidence that the prices contained in petitioners' bulletins were in no instance greater than the lowest

3. R. 838-854; 693-729; 676-677; 690-692; Assignments of Error 41-45 (R. 912-925); 48 (R. 930); 50-57 (R. 931-939; 59 (R. 939); 61 (R. 944); 63-66 (R. 945-948); 68-70 (R. 949-950).

Error 67, R. 948; R. 628, Assignment of Error 72, R. 950; R. 628, Assignment of Error 73, R. 951-955; R. 681-687, Assignment of Error 75, R. 956; R. 729-733, Assignment of Error 77, R. 958-962; Def. Ex. T-5 for Identification, R. 770, Assignment of Error 80, R. 964; R. 781, Assignment of Error 81, R. 965; R. 782-783, Assignment of Error 82, R. 965; R. 783, Assignment of Error 84, R. 966.

possible cost of merchandise plus a cost margin below which no grocer could do business, that they were so calculated, and were circulated as information; evidence that the trade was advised that it was merely expected to conform to the State law, that petitioners circulated copies of the State law and fairly explained it in detail, both in writing and at mass meetings addressed by district attorneys; evidence that the purpose and intention of petitioners and of their bulletins were to inform the grocers of figures below which it was believed that they could not sell "unless they could justify it under the Unfair Practices Act" (e.g., Assignment of Error 61, R. 944), and that the bulletins were so understood by the trade.

The District Court ruled that the Unfair Practices Act was a wholly immaterial factor. It declined to consider or decide the question of fact whether petitioners' activities were confined to enforcing that law. The theory of the prosecution and of the convictions is sharply epitomized in statements of government counsel and in numerous statements of the trial court tantamount to an informal opinion. We briefly quote some of them as a summary mode of stating the facts:

> "The District Court ruled with the Government and *excluded evidence offered to prove that appellants' conduct was allowable under the Unfair Practices Act* (R. 852-54)." (Government's brief in the Circuit Court of Appeals, p. 88.)
>
> "The Court *must* look to the facts in the case *without reference to the Unfair Practices Act* and determine whether they amount to a conspiracy to fix prices within the scope of the Sherman Antitrust Act. If they do, then an asserted defense based on *the Unfair Practices Act is irrelevant.*" (Ibid, p. 101.)
>
> "* * * *The Government takes the position that the State statute is immaterial in this case.*

* * * *That is our position in that respect.* Now, despite the presence of a document which refers to the Unfair Practices Act, or a discussion of that Act, *that Act still remains immaterial to the central issue of the case,* which is price fixing. The same thing goes for any discussion of the conduct of District Attorneys." (Government's opening statement at trial; R. 44, 45.)

"Mr. Bradley: Briefly, the Government takes the position the Constitution confides to the Congress full authority over the subject of commerce. Congress has legislated in that field in so far as the issues in this case are concerned through the medium of the Sherman Anti-Trust Act and kindred laws. * * * In such a situation, we hold that *any element relative to the enforcement of the California Unfair Practices Act,* any testimony as to good faith on the part of these defendants or their associates, any evidence as to what a local district attorney may or may not have done, or *any evidence of a similar vein is wholly irrelevant and immaterial in this case.*" (Statement at the trial by government counsel of basic position; R. 433, 434.)

"The Court: *I am not here called upon to pass in any manner on the state law.* The issue here is a violation of the Sherman Anti-Trust Act, which contains a price-fixing prohibition. What method you use in doing that is to me immaterial. If the ultimate result is price fixing, it is a violation.

Mr. Lasky: We are not fixing a price if we are enforcing the State Act against anyone violating it. As I said in my opening statement, by enforcing the State Act we necessarily affect prices.

The Court: If you violate the federal law you will have to accept it and recognize it.

Mr. Lasky: Then your Honor says that your Honor's conclusion is necessarily at variance with that of Judge Yankwich, because there is not any way we could enforce the state law without affecting prices.

The Court: If you fix prices it is a violation of the Sherman Anti-Trust Act regardless of what Judge Yankwich or anyone else said.

Mr. Lasky: * * * Let me call on Government counsel to find out what their position is.

Mr. Bradley: The court has stated Government counsel's idea of the law, exactly." (R. 436)

Judge Yankwich's view, here explicitly rejected by the trial court, is described by the Circuit Court of Appeals[4] thus: That there is no violation of the Sherman Act if the parties' activities are confined to making effective the California Unfair Practices Act (R. 1083-1084).

Interstate Commerce.

The state of the record concerning the issue of interstate commerce may most briefly be summarized in the concessions of government's brief below. It was there agreed that petitioners' acts were wholly local (Gov. Br., pp. 37-59), that the alleged restraints imposed by them were "imposed on or by intrastate activities" (Gov. Br., pp. 37, 38), that the alleged "price fixing conspiracy [was] on intrastate distribution" (Gov. Br., p. 71), *and that petitioners' activities in no way impaired or diminished the flow of goods into California* (Gov. Br., p. 77). It was further conceded that petitioners had no intent to restrain interstate commerce (Gov. Br., pp. 56-58). In this connection it is to be observed that the trial court excluded all evidence offered by petitioners as to their intent and lack of purpose to affect interstate commerce.[5]

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4. In its opinion in *Food and Grocery Bureau v. United States*, No. 10,109, decided the same day as the instant case, affirming *United States v. Food and Grocery Bureau, etc., et al.*, supra. That opinion is referred to in the opinion in the instant case, and it is set forth in the record here, at R. 1082-1097.

5. E. g., Assignments of Error 50, 51, 57, 61, 69, 76, 79; R. 931, 934, 938, 939, 944, 958, 964.

Baldly, the entire proof by the government is that *some* groceries sold in California originally came into the state from without.

The great bulk is manufactured or processed in California itself.[6] Of the remainder, much is acquired by California wholesalers or retailers from stocks maintained in California by the manufacturer. Of what is left, the bulk is shipped from without to California wholesalers, cooperative jobbers or chain organizations, and is placed in central warehouses in California. The groceries remain in the warehouses for varying periods of time, averaging 2½ weeks to 6 months. Thence they are distributed in the ordinary course of trade to retailers or retail outlets.[7] They are acquired and placed in these warehouses, not to supply any particular or identifiable retail outlet, but "merely * * * to fill orders we anticipate getting" (R. 367), "to meet anticipated orders from the trade" (R. 383), "so that we have enough stock on hand to anticipate orders" (R. 428), to supply retail outlets "in California as those retail stores order them" (R. 398), "as they require them, as they need them" (R. 405).[8] Only a minute fraction comes from without the state directly to retail stores. The alleged conspiracy related to the subsequent retail sale from the grocer's shelves.

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6. The record permits no precise statement of proportions; less than 12½% of the total consumption appears to have originated out of state. U. S. Exs. 66 (R. 372), 69 (R. 378); R. 378, 383, 384, 385; U. S. Exs. 72 (R. 408), 73 (R. 412); R. 427, 409, 428, 572.

7. R. 411, 426, 382, 366, 372, 374, 398, 402, 403, 405, 406, 571.

8. A remarkably apt analogy from a government witness, a chain-store executive:

> "we might liken a warehouse to a lake. You have tributaries of the watershed running into the lake and they are bringing waters from many different sources. That is like a warehouse. The sources come from interstate, intrastate, and they are commingled on the floor of the warehouse, or in the body of the lake. On the other end of the lake is an out-take that takes another mixture altogether different from the mixture that came in, but it is still food products." (R. 401)

The sufficiency of the proof with respect to interstate commerce was challenged by motions to dismiss (R. 597, 854), which were denied (R. 603, 854; Assignments of Error 3, 16, 17, R. 899, 906).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In failing to hold that associated activity for the purpose of enforcing the State Unfair Practices Act does not violate the Sherman Act.

(2) In holding that interstate commerce is involved so as to bring the case within the purview of the Sherman Act.

(3) In arriving at its decision upon grounds not available to it in view of the issues framed in the trial court and the exclusion of evidence.

(4) In affirming the convictions.

REASONS FOR GRANTING THE WRIT

1. The decision affirmed by the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court, and it has done so in a way which is in conflict with applicable decisions of this Court.

Thirty states have adopted *Unfair Practices Acts* modeled on the California Act.[9]

The Act declares its purpose to be the safeguarding of the public against the creation or perpetration of monopolies and the fostering and encouraging of competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discrimi-

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9. Listed in 2 *C. C. H. Trade Regulation Service* (9th ed.), at p. 7503.

natory practices by which fair and honest competition are destroyed or prevented (Section 13).[10]

These statutes represent the adoption by state legislatures of an economic and social policy that price cutting adversely affects the public interest. In cases involving Fair Trade Acts (relative to resale price maintenance), the same underlying policy has been upheld as within the competency of the states to adopt. (*Old Dearborn Co. v. Seagram-Distillers Corp.*, 299 U.S. 183; *Kunsman v. Max Factor & Co.*, 299 U.S. 198; *Max Factor & Co. v. Kunsman*, 5 Cal.(2d) 446, 55 Pac.(2d) 177.)[11]

While State *Unfair Practices Acts* strictly of the California type are said not to be "price-fixing" statutes,[12] as in certain phases they require an intent to injure competition, obviously they necessarily do affect prices; and any activity to enforce them necessarily has that effect (*Dikeou v. Food Distributors Association*, 108 Pac.(2d) 529, 107 Colo. 38). Granting interstate commerce, in the absence of the State statute it might be assumed that activity to effectuate the economic policy embodied in such a statute would violate the Sherman Act. Consequently,

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10. Mr. Justice Shenk in *Max Factor & Co. v. Kunsman*, 5 Cal.(2d) 446, 478; 55 Pac.(2d) 177:

> "it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws."

11. "There is a great body of fact and opinion tending to show that price cutting by retail dealers is * * * injurious to the general public. * * * The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned." *Old Dearborn Co. v. Seagram*, supra, at p. 195.

12. *Wholesale Tobacco Dealers v. National etc. Co.*, 11 Cal.(2d) 634, 82 Pac.(2d) 3; *Dikeou v. Food Distributors Association*, 107 Colo. 38, 108 Pac.(2d) 529, 534. But approximately twenty-three of the thirty states have provided in their Unfair Practices Acts for definite minimum markups. (The statutes are assembled in 2 *C.C.H. Trade Regulation Service* (9th ed.), at p. 7503, et seq.)

resting on an asserted conflict between the State Act and the Sherman Act and upon the blunt force of superior sovereignty, the government here claimed that the State Act was an immaterial factor. On that theory the convictions rested.

That theory is predicated on a view of the Sherman Act which is contrary to the view stated in *Parker v. Brown, State Director of Agriculture of California*, 317 U.S. 341, decided after the judgment of the trial court here.

The question is not one of power of the federal government to override state policy as expressed in state legislation, but of construction of the Sherman Act. *That Act is not aimed at restraints imposed by state action* (*Parker v. Brown*, supra). The policy and standard sought to be enforced by petitioners were not created by private agreement or sought to be imposed by "their will"; they were fixed by "legislative command of the state" (*Parker v. Brown*, supra).

Federal acts should be construed to avoid conflicts between state and federal power. The implied range of federal acts must be determined "with a due regard for a proper adjustment of the local and national interests in the federal scheme" (*Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, 351), and "to the implications of our dual system of government" (*A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 520).

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, * * * should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."
>
> *Penn Dairies, Inc. v. The Milk Control Commission*, 318 U.S. 261, at 265.

"As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

Maurer v. Hamilton, 309 U.S. 598, 614; so also *Davis v. Department of Labor,* 317 U.S. 249, 257.

In the court below, the government sought to distinguish *Parker v. Brown* on the ground that there the state had created an administrative bureau to enforce the state command so that the defendants were state officials, whereas here it had not done so. In adopting its social and economic policy, the state had a choice of means of enforcement. It could have created another administrative board, conferring upon it the duty to police all trades, investigate price cutting and enforce the law, or, consonant with an opposing belief that the growth of administrative law was to be deprecated, it could have left to private initiative the enforcement of the principles adopted by it, relying on individual citizens and trade associations to investigate violations, make surveys, and initiate complaints or proceedings.

The latter course is the traditional and earlier method of Anglo-American law, and many believe its growing displacement by administrative methods to be unwise.[13] The California Legislature may have been of this mind, or it may have preferred to leave the expense of enforcement to trade associations.[14] Such

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13. Cf. *Dikeou v. Food Distributors Association,* supra:
"Moreover, unlike most laws of this character, enforcement is left to the courts instead of to an administrative board. This should be of interest to those members of the legal profession who favor the judicial method, as a confirmation of their belief, if experience justifies it, that in such procedure more impartiality and fairness will result. The method of its enforcement is, of course, controlled by legislative authority and not by judicial sanction." (p. 534)

14. In the *"Final Report of the Attorney General's Committee on Administrative Procedure"* (U. S. Government Printing Office, 1941) reasons

questions of wisdom and choice do not concern us. But, certainly, Congress in adopting the Sherman Act in 1890 did not resolve those questions by imposing on states the duty of enforcing legislative policy by administrative bureaus and depriving them of the right to proceed by the more traditional procedure. We submit that the government should not be permitted to fasten upon *Parker v. Brown* such a stilted construction.

The rationale of the principle that price fixing is, *per se,* illegal is that the power to fix prices is too important to leave in the hands of any private group, it being a power "which may be pushed to evil consequences," and that courts should not be required to make a "survey of our economic organization and a choice between rival philosophies" in testing legality (*United States v. Trenton Potteries Company,* 273 U.S. 392, 397; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 226). This rationale does not require the condemnation of associated activity to enforce State Unfair Practices Acts. No power has been conferred on any private group to fix prices; no necessity of inquiring into reasonableness of prices is necessary:—the standard has been fixed by the State Legislature. No survey of economic organization or choice between rival philosophies is required of the courts:—that survey and that choice have been made by the Legislature.

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are stated why administrative agencies are sometimes created to enforce legislative policies instead of leaving enforcement to action in the courts. Of the latter procedure it is said (p. 14):

> "Action must be brought either in the name of the Government or by private individuals. * * * If brought by private individuals, there is cast upon these individuals a burden which it is one of the prime purposes of administrative agencies to avoid. Certain agencies, it is essential to recognize, represent an effort, whether wise or unwise, to place upon the Government—rather than upon millions of people of often limited resources—a large share of the responsibility for making effective policies which the people through their Government have declared."

The Sherman Act does "not prevent adoption of reasonable means to protect * * * commerce from destructive or injurious practices and to promote competition on a sound basis" (*Sugar Institute, Inc. v. United States*, 297 U.S. 553, 597). The State Legislature having selected the *Unfair Practices Act* as a means of protecting commerce from destructive and injurious practices and promoting competition on a sound basis (so declared in Section 13), and as part of that means having empowered trade associations to aid in its enforcement, the courts should not declare it to be an unreasonable means.

The Sherman Act is directed only at restraints which in some way "take from buyers or consumers the advantages which they derive from free competition" (*Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497, 500). But the type of selling which petitioners sought to prevent was not an advantage to which consumers were legally entitled in California.

2. The decision affirmed by the Circuit Court of Appeals has decided an important question of federal law in a way which is in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals.

In holding, on the record in this case, that interstate commerce is involved so as to bring the case within the purview of the Sherman Act, the decision is in conflict with the principles subsequently enunciated in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, which rejected a concept of interstate commerce less extreme than that which the government urged and the District Court here applied.

Its extreme character is readily apparent:—

Petitioners' activities were wholly local. We assume that the Sherman Act may be violated by local activities if (1) interstate commerce is substantially affected, or if (2) the object and

purpose of the conspiracy are to restrain or affect interstate commerce. But, as respects intent, the government conceded that petitioners had no intent or purpose to restrain or affect interstate commerce; their objective was a local situation. (Cf. *Industrial Association of San Francisco v. United States,* 268 U. S. 64; *Schechter Corp. v. United States,* 295 U. S. 495.) As respects effect, the only effect on interstate commerce charged in the indictment is that the amount of groceries shipped into Northern California was directly and substantially diminished (para. 21, R. 11). The government conceded, however, that this charge was not proved and that petitioners' activities had *no* effect on the "flow" of groceries into California.[15] No other tangible effect on interstate commerce has been suggested. Instead, the government urged that price fixing is, *per se,* illegal, without regard to effect. We submit that while price-fixing activities *in* or directed to the objective of interstate Commerce may be, *per se,* violative of the Sherman Act, activities neither *in* nor *aimed at* interstate commerce must have an actual effect on interstate commerce in order to fall under the ban of the Act.[16]

The bald question presented was whether, from the aspect of interstate commerce, the Sherman Act is concerned with price activities relating to retail sales made in the State of California by California retailers simply because some goods have originated outside of the state, having first come to wholesaler's warehouse or retailer's shelves in this state. The government claimed that it did, on an extreme "stream-of-commerce" theory

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15. Consequently, no questions arise here by reason of the replacement of the old term "directly and necessarily" by the new term "substantially." *Wickard v. Filburn,* 317 U.S. 111.

16. "I do not understand the authorities to hold that a mere charge that there was an intrastate combination directed to the fixing of prices in an intrastate market is alone sufficient to bring such a conspiracy within the reach of the Sherman Act." *United States v. French Bauer, Inc.,* 48 F. Supp. 260 (Sept., 1942). Cf. *United States v. Sheffield Farms,* 43 F. Supp. 1.

whereunder the retail sales were to be considered as still part of the interstate commerce.

If the Sherman Act is applicable on this record, no field of merchandise distribution can be conceived of where the Act is inapplicable, and, if the Sherman Act displaces the State Unfair Practices Act here, in no field of merchandise distribution may a state establish its own policies or concept of social desirability of price practices.

The government's position is contrary to the principles of *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins v. Carr Bros.*, 317 U. S. 572.

It conflicts with the principles stated in decisions of other Circuit Courts of Appeals (*Ewing-Von Allman Dairy Co. v. C and C Ice Cream Co.*, 6 Cir., 109 Fed. (2d) 898; cer. den. 312 U. S. 689; *Walling v. Goldblatt Bros.*, 7 Cir., 128 Fed. (2d) 778; *Albrecht v. Kinsella*, 7 Cir., 119 Fed. (2d) 778).[17]

Save for a minute fraction which goes directly to retailers, all groceries coming into California from without come to rest, according to the record, in central warehouses in this state, whether maintained by wholesalers, cooperative jobbers, or chain organizations, whence they are later distributed to retail outlets (see p. 10, supra).

No evidence was offered to show that any of the goods "were different from goods acquired and held by a local merchant for local disposition" (*Walling v. Jacksonville Paper Co.*, supra). Indeed, a case relating to an entire industry, as the present case does, rather than to the business of a particular company, would seem necessarily to be governed by the rules applicable to the usual and not unusual methods of merchandise distribution.

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17. For a carefully reasoned District Court decision, cf. *Walling v. Mutual Wholesale Food & Supply Co.*, 46 F. Supp. 939.

After reaching the central warehouses, the goods have ceased to be *in* interstate commerce. But apart from that, when thereafter they reach the retailer's shelves, certainly they cease to be in interstate commerce. Unless the subsequent retail sale is still "in the stream of commerce," the Sherman Act cannot here apply.

In the absence of any unusual facts, and there are none in this record, retail distribution is a business of purely local concern exclusively within the jurisdiction of the state. (*East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 471; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U. S. 498, 504; *Public Utilities Commission v. Landon,* 249 U. S. 236; *Walling v. Jacksonville Paper Co.,* supra; *Ewing-Von Allman Dairy Co. v. C and C Ice Cream Co.,* supra; *Veazey Drug Co. v. Fleming,* 42 F. Supp. 689, 695; *Walling v. Mutual Wholesale Food & Supply Co.,* supra.)

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

Although the two main issues had been, at the trial, sharply and deliberately framed by the government so as to make a decision upon them unavoidable, in order that the case would serve as a test case, the Circuit Court of Appeals refused to pass upon and failed to answer either question presented. Its mode of proceeding is indefensible; its opinion is based on assertions of fact which are wholly erroneous, which were never made by the government, and which, we are confident, government counsel will not endeavor to support; it proceeds on grounds *not available* to the court and not urged by the government.

The consequences of the failure of the Circuit Court of Appeals to decide the issue of the Unfair Practices Act are

more devastating and injurious than any decision it might have made on the subject. The retail trade in California—in every state—is left in dismayed confusion, for the government in the trial court had declared that it considered *any* activities of trade associations under an Unfair Practices Act to be violative of the Sherman Act, the trial court had approved that theory, and upon that theory petitioners were convicted. The convictions having been affirmed, no one can now possibly dare to endeavor to enforce these state laws. The prosecution will have accomplished its end by fear and intimidation rather than by forthright decision.[18]

The Circuit Court refused to decide the issue of the Unfair Practices Act because, so its opinion has it, the petitioners had not stayed within the confines of that Act in that they had ignored its requirement that sales below cost must have been made with intent to injure a competitor. In this respect the court overlooked the fact that, under the 1937 amendment to Section 3 of the Act, "loss-leader" sales are prohibited without regard to any subjective intent, but solely on an objective standard of diversion of trade from competitors or other actual injury to competition. But wholly apart from the 1937 amendment, *the question whether petitioners had gone beyond the State law*

18. The confusion "is worse confounded" because in *United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 43 F. Supp. 974, in the District Court for the Southern District of California, Judge Yankwich had said that bona fide enforcement of the Unfair Practices Act would not violate the Sherman Act. That case was argued in the Circuit Court of Appeals months before the instant case, but the two were decided the same day, and the Circuit Court of Appeals expressly refrained from approving Judge Yankwich's view of the law. The opinion of the Circuit Court of Appeals assumes that the record in the Southern case and that in the instant case are the same. In fact, they are wholly different. The issue on the appeal in the Southern case was whether there was sufficient evidence to support the finding that defendants there had gone beyond the confines of the State law. Here the issue was whether the trial court erred in declining to decide at all whether petitioners had gone beyond or stayed within the confines of the State Act. That issue did not have to be decided on the appeal in the Southern California case; here it was inescapable.

was not before the Circuit Court of Appeals; the ground of its decision was not available to it. The petitioners had implored the trial court to pass on the question of fact whether their conduct was in conformity with the State Act, but the trial court declined to do so. It sustained the government's contention, and it excluded evidence which, if admitted, would have tended to show that conformity. The very point of the appeal was that the trial court erred *in refusing to consider* whether appellants stayed with, or went beyond, the State law provisions, and in rejecting evidence material to that consideration. *Government counsel conceded that such was the issue presented by the appeal* (see p. 7, supra). Yet the Circuit Court of Appeals affirmed, not on the ground that the trial judge was right in refusing to consider any evidence as to such conformity, but by proceeding to weigh, and to choose from, the partial evidence on the point which had come into the record and by concluding, *as if it were a trial court,* that appellants went beyond the terms of the statute. Petitioners were thus deprived of the trial of the issue in a trial court, a trial which they sought in vain in the District Court.

The Circuit Court of Appeals' assertion that the petitioners ignored the intent feature and had not informed the trade of it is predicated on a statement that not until a year before the indictment had petitioners referred to that feature in their communications with the trade. That statement is absolutely incorrect. A mass of written and oral evidence to the contrary is in the record;[19] the trade was informed by bulletins, early and late;

19. For example, U. S. Ex. 40, R. 492, 493; Def. Ex. T-3, R. 765, 769; U. S. Ex. 31-1, R. 451; R. 937, 938 (Assignment of Error 56); R. 638, 613-615 (Assignment of Error 52, R. 935); R. 621, 936, 429, 430, 431, 432, 574; U. S. Ex. 15-15, R. 106; Def. Ex. I, R. 620; R. 621 (Assignment of Error 54, R. 936); Def. Exs. G and G-1, R. 604; R. 733 (Assignment of Error 78, R. 962); U. S. Ex. 15-34, R. 120; Def. Ex. P-5, R. 658; R. 638, 639, 686.

full texts of the Act were distributed; the intent feature was explained orally and understood by the trade, as every government witness on the subject admitted (e.g., R. 429, 574); petitioners repeatedly had the Act explained to meetings of the trade by district attorneys. Whether, upon weighing and appraising the whole record of evidence admitted and improperly excluded and judging the intended effect of petitioners' bulletins and the manner in which they were received and understood by the trade in the entire factual context in which they were issued, a court could justifiably conclude that petitioners had ignored the intent feature of the State law, was not the issue before the appellate court. No such appraisal had been made by the trial court; *no such contention had even been made by the government.* Petitioners' explicit efforts to have the trial court consider this very question of the intent feature had failed.[20]

Where a conviction is based on a general verdict, and where one of the theories on which the case was tried and submitted

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20. Note the following, which occurred upon an offer of evidence:

"Mr. Alioto: In view of the positive language in the Socony case that economic benefit cannot justify price fixing and conspiracy, I object to this as irrelevant.

Mr. Lasky: I am not trying to show an economic benefit; I am trying to show something else.

The Court: If we are not in economics, where are we?

Mr. Lasky: Does your Honor want me to explain?

The Court: Yes.

Mr. Lasky: I will explain by saying that the law provides that any selling below cost with intent to injure a competitor is illegal. The indictment alleges we misrepresented the intent feature. I think it is in point to show that these defendants knew that wherever there was a sale below cost, competitors were in fact hurt, and under the amendment to the law in 1937 that was presumptive evidence he had intended to violate the law. As to the other point of view, that the state law has nothing to do with this case, we want to present to your Honor for your Honor's judgment the whole facts, and not only a partial statement of the facts."

The evidence was first admitted (R. 616), but later it was stricken (R. 838, 843, 854; Assignment of Error 53, R. 935).

is incorrect, the judgment may not be supported on the supposition that it was rendered on a correct theory (*Williams v. North Carolina,* 317 U. S. 287; *Viereck v. United States,* 318 U. S. 236.) *A fortiori,* where a trial is by the court alone, and the court makes it clear that its judgment is based on a given theory and that it refuses to decide any question of fact material under another theory, and where it excludes evidence admissible under the latter theory, an Appellate Court cannot be free to explore the record, or to weigh the excluded evidence, as if it were a trial court, in order to find evidence on which the defendant might have been convicted on that other theory.[21] Here, for example, evidence bearing on cost and cost surveys was excluded. The exclusion was justified by the Circuit Court of Appeals on the ground that, as petitioners had gone without the confines of the State Act in respect of its "intent" provisions, it was unnecessary for the trial court to consider whether they were within its confines with respect to its cost provisions. The fallaciousness of such reasoning is apparent from the fact that at the moment when some of this evidence was excluded (e. g., R. 771, et seq., and Def. Ex. U for Identification), the defendants' case was not yet closed; the trial court could not yet have, with judicial propriety, formulated any conclusions concerning the defendants' regard of the "intent" feature

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21. Cf. *West Coast Life Ins. Co. v. Crawford,* 58 Cal. App.(2) 771, 774, 138 Pac.(2) 384: "All that we are saying is that as a matter of law inferences favorable to the plaintiff could have been drawn from exhibit 7 had it been received in evidence. The possibility that the trial judge would not have drawn such inferences does not retrieve from error the ruling rejecting the exhibit."

Mashbir v. Mashbir, 29 Cal. App.(2) 733, 737; 85 Pac.(2) 482: "There is no merit in the contention that the error is not prejudicial * * *. As the record is presented to this court the trial court did not consider the evidence as set forth above before making its findings of fact, and we cannot say that, had the trial court received the excluded evidence and given it due consideration, a different result would not have ensued."

(cf. *Bates v. Oregon-American Lumber Co.*, 9 Cir., 295 Fed. 1, 5). The fact that success on one issue will be of no avail unless another issue is sustained does not justify exclusion of an offer of proof on the former (64 C.J. 130). The evidence was rejected with this interchange:

> "The Court: *Do you want a record on it?*
> Mr. Lasky: Yes.
> The Court: Objection sustained." (R. 772)

Patently, what the trial court desired to give petitioners "a record on" was its ruling that the State Unfair Practices Act was wholly immaterial and its refusal to pass on any question connected with it; certainly not that it excluded the cost evidence because it had, midstream, arrived at some adverse conclusion on another question of fact.

Had the government at the trial as much as intimated a contention that petitioners had ignored the "intent" feature, and had the trial court not made it crystal clear that it would consider all evidence relative to the State Act to be immaterial and would exclude any such evidence, further evidence could have been offered on the subject. Where a trial judge makes it clear that he regards an entire class of evidence as immaterial, where he makes it manifest what issues he regards as material or immaterial, the error is preserved to the aggrieved party. (*Caminetti, Insurance Commissioner v. Manierre*, 23 A.C. 93, 98 99; 142 Pac.(2) 741 (Cal. Sup. Ct., Oct., 1943); *Bates v. Oregon-American Lumber Co.*, 9 Cir., 295 Fed. 1, at 5; *I Wigmore on Evidence* (3rd ed.), Sec. 17, p. 318).

If associated activity to enforce the State Act is itself a violation of the Sherman Act, we submit that it should be so announced. If it is not a violation of the Sherman Act, then petitioners are entitled to have the cause remanded for a new trial, so that they may have the issue of fact, whether they stayed

within or went beyond the confines of the State Act, decided by a *trial court,* after all material evidence has been received.

With respect to the issue of interstate commerce, the opinion of the Circuit Court of Appeals has only this to say:

> "Again as in the Southern California case, the conspiracy aimed to fix all minimum retail prices *whether of an out-of-state wholesaler making an interstate sale* or a retailer selling goods he had imported from out-of-the-state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, *whether interstate* or intrastate." [Italics added.]

If by this the court meant to denominate as an interstate sale the local resale in retail trade of goods theretofore brought into the state, it begs the question. If it meant something more, we say without reservation that the statement has no foundation in the record. *The question is not one of weighing evidence, analyzing it, or discussing particular facts.* There is simply not a scrap of evidence of any activity of the petitioners in any way directed at, connected with, or affecting out-of-state wholesalers making interstate sales or with respect to the prices charged by out-of-state wholesalers. *The government has never even claimed that there was any such evidence or any such element in this case.* "Purpose" to stabilize interstate trade may only be inferred from (a) evidence of state of mind, or (b) from acts and effect. Here the government conceded that there is no evidence of effect on interstate sales or of any act directed toward such sales, and the trial court excluded all evidence as to petitioners' state of mind and purpose (see p. 9, supra). The assertion of the Circuit Court of Appeals is a purely gratuitous assumption that

what was true in another case involving a different group of trade associations in Southern California was true of petitioners in Northern California.[22]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: San Francisco, California, March 6, 1944.

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22. Moreover, the indictment charges a conspiracy to fix retail prices, not whosesale prices. There is some reference to the latter as one of the means of fixing retail prices, but there is no evidence relating to wholesale prices after early 1937 (which is before the period of the statute of limitations), and that evidence relates solely to "wholesalers in Northern California" selling to retailers in that area (R. 250, 253, 256, 259).

(APPENDIX FOLLOWS)

Appendix

CALIFORNIA UNFAIR PRACTICES ACT

(Stats. 1935, ch. 477, p. 1546; Amended by Stats. 1937, ch. 860, p. 2395; Stats. 1939, ch. 175, p. 1424; transferred by Stats. 1941, ch. 526, p. 1847, to Business and Professions Code.)

An act relating to unfair competition and discrimination, defining certain unfair and discriminatory practices, including loss leader selling and selling below cost, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this act a misdemeanor and providing penalties.

The People of the State of California do enact as follows:

Sec. 1.* * * * * * * * *

Sec. 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation, shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

Sec. 3. It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, and he shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

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*Sec. 1 is not material; it relates to discrimination. It was first enacted in 1913 as the "Anti-discrimination Act" (Stats. 1913, p. 508), and amended in 1931 (Stats. 1931, p. 1333) and 1933 (Stats., pp. 793, 1280. The provisions on below-cost selling were added in 1935, and the Act was renamed the "Unfair Practices Act."

The term "cost" as used in this act as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" as used in this act is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

The prohibitions of this act shall be deemed among the other purposes and objects of the act to also prohibit the practice of using any article or product as a "loss leader." Loss leader, as used herein, shall mean any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors.

The prohibitions of this section shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby a sale below cost is effected in violation of the spirit and intent of any of the provisions of this act.

Sec. 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the

replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

"Ordinary channels of trade" shall mean those ordinary, regular and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another, and shall not include sales of bankrupt stocks, closeout goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever; provided that this last listing herein shall not be held to be all-inclusive but as example only.

Sec. 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof

of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition.

Sec. 6. The provisions of sections 1, 3, 4 and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area and in the ordinary channels of trade as herein defined; . . .

* * * * * * *

Sec. 7. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act.

Sec. 8. (Repealed, 1937.)

Sec. 9. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of sections 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had.

Sec. 10. Any person, or any trade association, may bring and maintain an action, or actions, to enjoin and restrain any violation, or violations, of any provision, or provisions, of this act and, in addition thereto, for the recovery of damages. If it shall appear to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary injunction should not be issued, or upon the hearing of any motion for a preliminary injunction, or if the court shall find, in any such action, that any defendant therein is violating, or has violated, any provision of this act, then the court must and shall enjoin such defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by such defendant; . . . It shall not be necessary for the plaintiff, in any such action, to provide nor file any undertaking or bond for the issuance of any such interim or final injunction.

In any such action, it shall not be necessary to allege nor prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover the amount of the actual damages, if any, sustained by such plaintiff, as well as the actual damages, if any, sustained by any person who has assigned his claim for damages to such plaintiff, which said damages are the result of any violation, or violations, of any provision, or provisions, of this act.

* * * * * * *

Sec. 11. Any person, whether as principal, agent, officer or director, for himself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any

of the provisions of sections 1 to 7, inclusive, of this act is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, shall be presumptive evidence of cost as to each such article or product involved in any action brought under this act and involving the violation of any provisions of sections 3 and 5 of this act.

* * * * * * *

Sec. 13. The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

Sec. 14. This act shall be known and designated as the "Unfair Practices Act."

Sec. 15. (a) In any action brought under the provisions of section 3 hereof where it is alleged and shown that the person complained against is selling below his cost of doing business, and said person is including labor at less than the prevailing wage scale in the trade in which such person is engaged for the locality or vicinity in which he is doing business, evidence of such prevailing wage scale shall be admissible to prove the intent or purpose of such person to violate the provisions of this act.

In any action brought under the provisions of this act, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this act, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered.

* * * * * * *

Sec. 16. As used in this act, the term "person" includes any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation; the term "sell" includes selling, offering for sale or advertising for sale; the term "give" includes giving, offering to give or advertising the intent to give; the term "article or product" includes any article, product, commodity, thing of value, service or output of a service trade.

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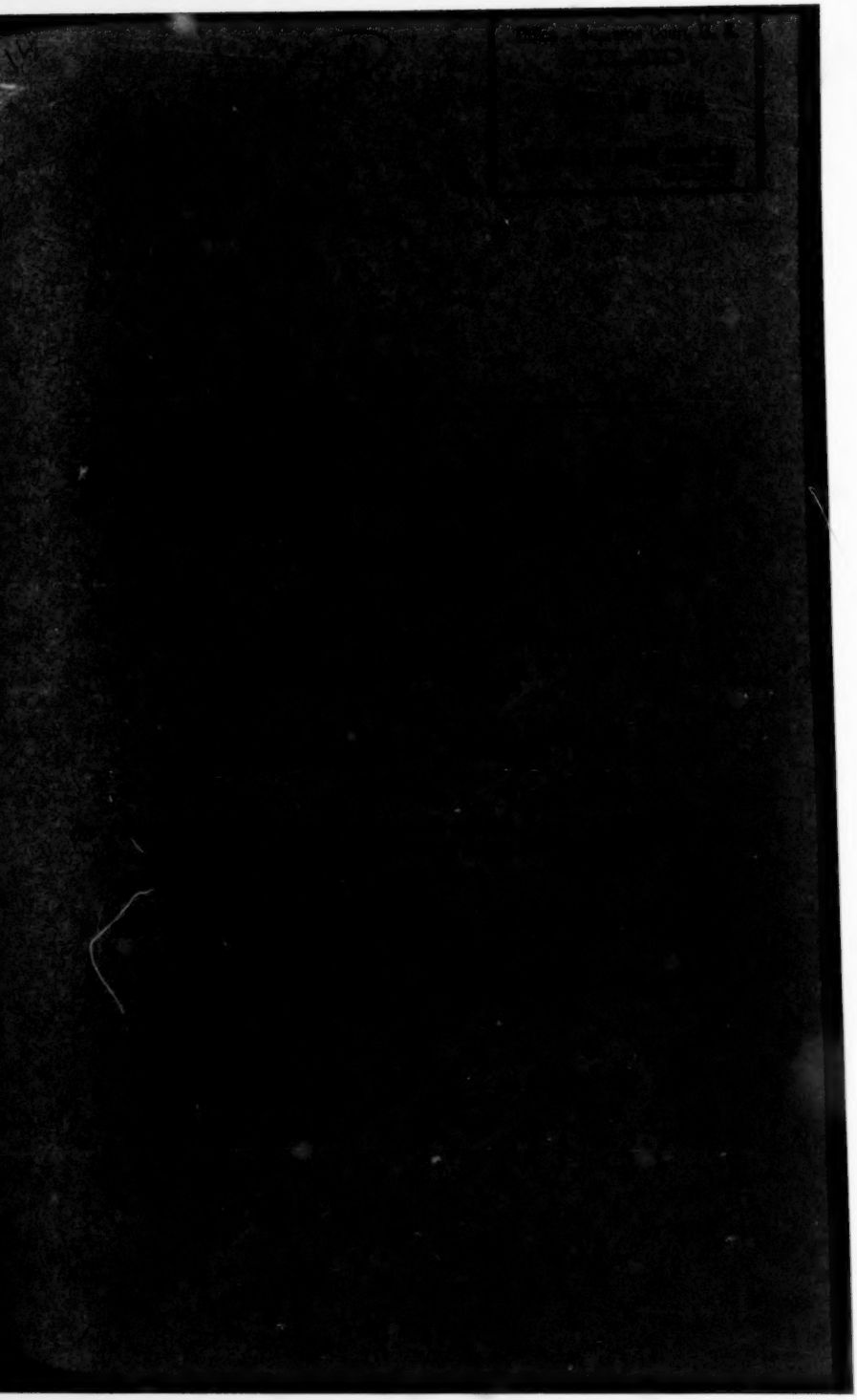

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582611—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 787

CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD.; ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the circuit court of appeals (R. 1098–1112) is reported in 139 F. (2d) 978.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 30, 1943, and the petition for rehearing was denied February 16, 1944 (R. 1112–3). The petition for a writ of certiorari was filed on March 13, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925, and as modified by Rule 11 of the Criminal Appeals Rules.

QUESTIONS PRESENTED

1. Whether the district court erred in rejecting evidence offered to show that petitioners' purpose in conspiring to fix prices was to secure compliance with the California Unfair Practices Act by retail and wholsale grocers.

2. Whether the evidence warranted the district court in finding that petitioners' price-fixing conspiracy restrained interstate commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1), provides, in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT

An indictment returned in March 1942 charged petitioners and others with having been engaged since June 1935 in a conspiracy to fix, maintain, and stabilize the retail prices of grocery products shipped into the northern part of California from other States, in violation of Section 1 of the Sherman Act.[1] The indictment also charged that,

[1] The area of price fixing covered by the indictment is that part of the State of California bounded by Bakersfield and San Luis Obispo on the south and by the Oregon State boundary line on the north (R. 3, 12).

as a part of the conspiracy, the wholesale prices of such goods were fixed. (R. 2–20.) Petitioners[2] were tried by the district court after jury trial had been waived and were found guilty, and their convictions were affirmed by the circuit court of appeals (R. 43, 862–3, 1112).

There is little dispute as to the facts established by the Government's evidence, which was in large part documentary. The conspiracy was formed by California Retail Grocers & Merchants Association, Ltd., which will be referred to as the Association, a membership corporation composed of retail grocers doing business in California. The other principal participants in the conspiracy were various allied associations composed of retailers, or of retailers and wholesalers, engaged in selling grocery products in the northern part of California. Ostensibly the undertaking was one to enforce and police the California Unfair Practices Act (R. 46).[3] What petitioners actually undertook to do and did was to fix and stabilize retail and wholesale prices on grocery products throughout the entire northern part of the State of California, as shown by the follow-

[2] Petitioners are thirteen associations of retail grocers in northern counties of California and nine of their officers. Of the defendants other than petitioners, the three chain store corporations and their officers and two other defendants pleaded nolo contendere (see R. 38), and the indictment was dismissed prior to trial as to two other defendants.

[3] This statute is set forth in the Appendix to the petition.

ing summary of certain facts shown by the evidence.

Petitioners undertook to bring about the adoption of a specified percentage mark-up by all retail grocers. The mark-up originally agreed upon, to become effective September 6, 1935, was 6% (R. 229–31). Since retailers making quantity purchases could sometimes buy directly from manufacturers at the jobber or wholesale price and this "practice has the tendency to break down retail price structures," it was agreed that, effective January 1, 1936, there should be an additional 2% mark-up on all such direct purchases (R. 245–6). In the spring of 1938, the general retail mark-up was raised to 8% (R. 280–1, 297–8); in November 1939, it was raised to 10% (R. 65, 314, 568–9).

Petitioners likewise procured the adoption of a specified percentage mark-up on wholesale sales of grocery products. The Food Trades Institute, Inc. (hereafter referred to as the Institute), a department or branch of the Association (R. 276), notified all northern California wholesalers that in order to maintain the excellent results achieved in the retail field, it was necessary to have a "definite understanding" with them that their minimum mark-up would be 3% (R. 251–3). This agreement became effective April 10, 1937 (R. 253). The detailed nature of the agreement is shown by the following excerpt from a bulletin sent to wholesalers by the Institute, to become effective June 1, 1937 (R. 261):

> Drop shipments[4] to be invoiced at not less than 1% over net cost covering articles enumerated on the attached list and all other articles that may be added to same from time to time.[5]

This program applied to all wholesalers, including retail-owned organizations and chain stores distributing through their own warehouses (R. 262). Every wholesaler was required to have "the same price to everyone" (R. 252). The Institute advised wholesalers that any violation reported to it would be investigated and that it would assist the county district attorney in preparing suits against violators under the California Unfair Practices Act (R. 259).

In the case of importing wholesalers, the mark-up was fixed at 10% and, to put all purchasing retailers "on an equal basis," the mark-up was to be based on replacement cost, not the actual cost of stocks on hand (R. 253–4). The Institute informed these wholesalers that "you must submit a list of your selling prices, particularly on the staple lines," to the Institute and notify it at once of any price changes, and that "No sale below your regular price list is permitted" (R. 255).

At a meeting in December 1935 attended by representative food manufacturers, brokers, and

---

[4] Drop shipments are shipments direct from manufacturer to retailer.

[5] There followed a list of a number of firms and of commodities (R. 261).

wholesalers, as well as over 60 of the larger San Francisco retailers, it was agreed that the retail price of fresh butter "could not be stabilized unless there was some stabilization from the jobbing point of view"; that the Institute be set up as the butter "coordinating agency"; that every butter jobber use as his "basic price" the price on the San Francisco Butter Exchange, file with the Institute his overage above this price, make no sales at less than "his published overage over the Exchange price," and file with the Institute 24-hour advance notice of any change in overage, which the Institute would immediately report to every jobber (R. 239, 275–6).

As early as December 1935, petitioners went beyond merely agreeing on fixed mark-ups on retail prices. At that time, many grocery items had "advanced materially in price." It was pointed out that a retailer who sold on the basis of the cost of his stocks on hand was "simply forcing Everyone Else to take a loss for no reason whatsoever." To prevent this, "minimum retail prices" on numerous staple items "were agreed to, effective January 1st, 1936". (R. 246–7.)

At this same meeting in December 1935, in order to end the "bad practice" of "price cutting" on butter, a rule "establishing minimum retail prices" was unanimously adopted. The rule required each retailer to add to the basic price for the preceding day set by the Butter Ex-

change a mark-up stated in terms of a specified number of cents. (R. 247.)

As to items not covered by agreement on specific prices, care was taken to prevent variables in the cost on which the mark-up was based. It was agreed that the mark-up should be based on invoice price without taking into account any cash discount or advertising allowance received by the retailer. (R. 243–4, 271–3.) Furthermore, petitioners' "Price Stabilizing Program" undertook to eliminate price competition not only between retail grocers but also between them and others who handled goods of the same kind.[6]

In order to finance enforcement of the program, all wholesale distributors of evaporated milk in northern California were asked to add 2¢ per case to their selling price and remit to the Association monthly the amount of this mark-up (R. 68–9, 425). The plan was presented to both wholesalers and "the milk companies selling direct to the retail

[6] An Institute bulletin issued when the agreed mark-up by retail grocers was 6%, reads in part (R. 271, 273):

> On taxable items the mark-up must be 9% as all grocers are in the habit of absorbing the Sales Tax. This will stabilize prices between the druggists and grocers as the former charge the Sales Tax and the grocers do not.
>
> * * * * *
>
> This program has been sanctioned unanimously by the larger grocery operators in San Francisco and assurance has been received from the large drugstore operators in San Francisco that the above will be maintained on grocery items sold by them.

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trade," and "definite commitment" to adopt the plan was received by the Institute from approximately 95% of the wholesalers and direct sellers (R. 424–5). The Association warned a wholesaler that "it may be necessary for us to inform the trade of those wholesalers who refuse to cooperate in this fair and equitable plan" (R. 425).

A very substantial part of the products handled by wholesalers in northern California came from without the State. In northern California, the defendant Safeway Stores, Inc., operated about 600 retail stores, made annual purchases of "dry" groceries of about $28,000,000, distributed goods through its six or seven central warehouses by weekly or semi-weekly deliveries to its stores, and received deliveries from out-of-State points of such items as canned corn, canned peas, canned string beans, and Campbell Soup Co. products at an average rate of a carload a week. (R. 404, 406.) Ninety percent of purchases aggregating over $2,000,000 made by a San Francisco wholesaler were obtained by direct shipment from manufacturers outside the State (R. 378–382, 384–5).

Various methods of distribution which closely linked wholesaler and retailer were shown. A group of retailers who are tied into some special working arrangement with a specific wholesaler and obtain supplies from him on a preferential basis are known as a "voluntary chain" (R. 362, 363). A "cooperative" jobber is one organized as

a membership corporation, with membership confined to retailers who pay a monthly service fee and receive a return of the profits of wholesale operations (R. 363, 367). A cooperative of this kind operating in northern California had about 700 members and purchased many of its most important items from manufacturers outside California (R. 363, 371–2). Some of the items which it handled, such as sugar, turned over almost daily (R. 372).

ARGUMENT

1. Petitioners contend that the court below erred in holding that the district court had properly rejected certain evidence offered to show that petitioners' objective was to secure observance of the California Unfair Practices Act (which is reproduced in the Appendix to the petition). Petitioners urge (Pet. 13, 14–15) that this holding is in conflict with *Parker* v. *Brown*, 317 U. S. 341.

This Court held in *Parker* v. *Brown* that the Sherman Act does not apply to "state action or official action directed by a state" and that a State, when carrying out State legislation, enters into no "conspiracy" in restraint of trade within the meaning of the Sherman Act. But the Court also declared that a State was powerless to sanction restraints of trade by private agreement which the Sherman Act prohibits. When Congress in the exercise of a granted power occupies

a legislative "field," its enactment prevails over inconsistent State legislation and, in consequence, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (317 U. S. 341, 350, 351).

Since petitioners' activities would not be State action or action required by State authority even if these activities had been directed at securing adherence to the provisions of the California Unfair Practices Act, proof that this was petitioners' purpose would not bring the case within the ruling in *Parker* v. *Brown*. Exclusion of evidence of such purpose was therefore not in conflict with that decision. Petitioners attempt to bring themselves within the decision by implying (Pet. 14–15) that the California legislature intended to leave enforcement of this statute to "private initiative," but petitioners have been unable to show that this was the legislative intent. There is plainly no basis for such an interpretation of the statute. It contains penal sanctions (sec. 11), enforceable by State officials.[7] The fact that any person, including a "trade association," is authorized to bring an action to restrain violations (sec. 10) obviously does not

[7] In addition, it is made the duty of the Attorney General of California (sec. 8) to institute quo warranto proceedings against a corporation upon third violation of the statute.

convert these potential plaintiffs into State enforcement officers.

Petitioners also contend (Pet. 15–16) that, where the objective of those engaged in price fixing is to bring about adherence to State legislation, there is, or should be, an exception to the settled rule that price fixing is illegal *per se* under the Sherman Act. If this interpretation of the Act were adopted, presumably the objectives of petitioners in fixing prices would be relevant and evidence offered as to their objectives should have been received. But the novel construction of the federal statute proposed by petitioners must, we submit, be rejected. Petitioners point to no decision supporting it. To accept it would mean that the policy declared by Congress as to interstate commerce would not have a uniform application but would vary in accordance with the varying rules applied by the different States to their local trade and commerce.

The evidence offered by petitioners was also properly rejected because, as the court below held, it did not show or tend to show that petitioners did no more than promote agreements not to violate the California Unfair Practices Act. That statute does not authorize price fixing nor does it prohibit the sale of goods below "cost" (sec. 3) except where the sale is for the purpose of injuring or destroying competitors.

Wholesale Tobacco Dealers v. *National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 655, 658–660.[8] The proof in the instant case indubitably established that petitioners engaged in fixing prices and established a fixed mark-up applicable to every sale irrespective of any purpose to injure or destroy competitors.[9] Accordingly, even if the question whether petitioners had acted in conformity with the Unfair Practices Act were relevant to the issues in this case, the evidence that the agreed mark-ups represented or were believed to represent the retailer's or wholesaler's cost does not show or tend to show that agreement upon such mark-ups was tantamount to agreement not to violate the State law.

2. Petitioners contend that the court below erred in holding that the evidence was sufficient

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[8] Petitioners, by referring (Pet. 20, 22) to a 1937 amendment to Section 3 of the California Act, prohibiting, within certain limitations, "loss leader" sales, apparently intend to suggest that the *Wholesale Tobacco Dealers* case is not an authoritative interpretation of the law in effect since 1937. While that case involved the law as enacted in 1935, the court (11 Cal. (2d) at p. 659) referred to the 1937 amendment of Section 3 as reinforcing its construction of that Section.

[9] Petitioners refer to numerous record citations in support of their statement (Pet. 21) that the court below was mistaken in stating that petitioners did not, prior to March 1941, inform the trade that sales below cost do not violate the Unfair Practices Act unless made with intent to injure competitors. We find in these citations no written communication to the trade of this nature apart from quotation of or remittance of the text of the law.

to justify the trial court in finding that their conspiracy was in restraint of interstate commerce.[10] We submit that the evidence in this case, which shows that throughout most of California the wholesale and retail trade in groceries was blanketed by price-fixing agreements, fully warrants the finding that commerce in groceries shipped into the State from without was restrained. The trade of shippers of such products was clearly restrained when, by reason of the conspiracy, these shippers were compelled to sell in a market in which price competition among the purchasers of their goods was wholly or largely suppressed. Similar facts have been held to support a finding of restraint of interstate commerce. *Local 167* v. *United States,* 291 U. S. 293, 297; *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *United States* v. *General Motors Corp.,* 121 F. (2d) 376, 398, 401–402, certiorari denied, 314 U. S. 618; cf. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52. In the *Local 167* case, this Court said (291 U. S. at p. 297):

> The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate move-

[10] Petitioner's references (Pet. 9, 17) to the Government's position in the court below with respect to interstate commerce were derived from statements torn from context and hence convey an inaccurate impression. Cf. R. 1111.

> ment ends may operate directly to restrain and monopolize interstate commerce.
> * * *

Contrary to petitioners' assertions (Pet. 16, 18), the decision that there was sufficient evidence to warrant a finding of interstate commerce is not in conflict with *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, or the companion case of *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. The question presented in those cases was whether certain employees were engaged "in [interstate] commerce," not whether interstate commerce was restrained by acts which themselves might not be interstate. Furthermore, under the facts previously set forth as to the interstate purchases and distribution systems of chain stores and cooperative jobbers (*supra*, pp. 8–9), at least a part of the sales subjected to price fixing must be deemed to have been in interstate commerce [11] within the principles set forth in the *Jacksonville Paper* case. These facts alone warrant the district court's determination that interstate commerce was restrained.

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[11] As the circuit court of appeals held, "the conspiracy aimed to fix all minimum retail prices whether of an out-of-state wholesaler making an interstate sale or a retailer selling goods he had imported from out-of-the-state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate" (R. 1111).

Petitioners in their supplemental brief contend that the decision below is in conflict with *Frankfort Distilleries, Inc.* v. *United States,* decided by the Circuit Court of Appeals for the Tenth Circuit on February 28, 1944. The court in that case held that the indictment charged a conspiracy intended to affect only intrastate activities and that it did not allege that the defendants' restraints of these activities directly and substantially burdened interstate commerce. There is, we submit, no conflict between that decision and the holding in the instant case, which turns upon the question whether there was proof to support the trial court's factual determination that the restraints imposed by petitioners were not confined, in their purpose and in their effect, to intrastate commerce.

The ruling of the circuit court of appeals respecting interstate commerce concededly does not rest upon any new or novel principle of law. Where the question, as here, turns upon the sufficiency of the evidence and two lower courts have held the evidence sufficient, there is no need for further review.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILED
MAR 31 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 787

CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD., a corporation, CENTRAL CALIFORNIA RETAIL GROCERS & MEAT DEALERS ASSOCIATION, a corporation, CENTRAL COAST COUNTIES ASSOCIATION OF RETAIL GROCERS, INC., a corporation, FOOD TRADES INSTITUTE, INC., a corporation, FOOD INDUSTRY BUREAU, INC., a corporation, KERN COUNTY RETAIL GROCERS & MERCHANTS ASSOCIATION, a corporation, RETAIL GROCERS ASSOCIATION OF ALAMEDA COUNTY, a corporation, RETAIL GROCERS ASSOCIATION OF SAN FRANCISCO, LTD., a corporation, TULARE-KINGS RETAIL GROCERS ASSOCIATION, CONTRA COSTA COUNTY RETAIL GROCERS ASSOCIATION, YOSEMITE EMPIRE RETAIL GROCERS ASSOCIATION, SONOMA COUNTY RETAIL GROCERS ASSOCIATION, FRESNO COUNTY RETAIL GROCERS ASSOCIATION, WILLIAM D. HADELER, F. A. TISSIER, F. H. McFARLAND, A. H. ROLFES, GRACE GASPAR, J. N. SHOULTS, W. C. MILLER, FRED VERLEGER and I. H. WALLACE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1943

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

We submit this supplemental brief in order to cite *Frankfort Distilleries, Inc. v. United States of America,* decided by the Circuit Court of Appeals for the Tenth Circuit on February 28, 1944.

We cite the *Frankfort* decision in connection with the subject of interstate commerce, which is involved in the second question stated at page 2 of our petition and which is discussed at pages 16 to 19 and 25 of that petition.

The decision of the court below in the instant case is in direct conflict with that of the Tenth Circuit in the *Frankfort* case.

The latter had to do with an indictment charging violation of the Sherman Act by reason of activities under the Colorado Fair Trade Act with respect to retail prices in Colorado of commodities (liquor) largely brought into the state from without. The indictment in the *Frankfort* case is strikingly similar to the indictment in the instant case.

The exact position contended for by petitioners here was sustained in the *Frankfort* decision.

As the opinion in the *Frankfort* case is not yet reported, we quote it in full in an appendix.

Respectfully submitted,

San Francisco, California
March 29, 1944

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(APPENDIX FOLLOWS)

Appendix

United States Circuit Court of Appeals
Tenth Circuit

Nos. 2792-2793-2794-2795-2796-2797-2798-2799

JANUARY TERM, 1944.

FRANKFORT DISTILLERIES, INC., *Appellant,*
2792 vs.
UNITED STATES OF AMERICA, *Appellee.*

NATIONAL DISTILLERS PRODUCTS CORPORATION, *Appellant,*
2793 vs.
UNITED STATES OF AMERICA, *Appellee.*

BROWN FORMAN DISTILLERS CORPORATION, *Appellant,*
2794 vs.
UNITED STATES OF AMERICA, *Appellee.*

HIRAM WALKER, INC., *Appellant,*
2795 vs.
UNITED STATES OF AMERICA, *Appellee.*

SCHENLEY DISTILLERS CORPORATION, *Appellant,*
2796 vs.
UNITED STATES OF AMERICA, *Appellee.*

SEAGRAM-DISTILLERS CORPORATION, *Appellant,*
2797 vs.
UNITED STATES OF AMERICA, *Appellee.*

Appeals from the District Court of the United States for the District of Colorado.

McKESSON & ROBBINS, INCORPORATED, *Appellant,* 2798 vs. UNITED STATES OF AMERICA, *Appellee.*	}	Appeals from the District Court of the United States for the District of Colorado.
J. E. SPEEGLE, *Appellant,* 2799 vs. UNITED STATES OF AMERICA, *Appellee.*	}	

[February 28, 1944.]

W. W. Grant (Morrison Shafroth and Henry W. Toll were with him on the brief) for Appellants Frankfort Distilleries, Inc., Seagram-Distillers Corporation, McKesson & Robbins, Inc., and J. E. Speegle; and (Morris Rifkin was with him on the brief) for Appellant J. E. Speegle.

William V. Hodges (Hodges, Vidal & Goree were with him on the brief) for Appellant National Distillers Products Corporation.

D. L. Street, Peter Holme and Robert E. More were on the brief for Brown Forman Distillers Corporation.

Charles Rosenbaum (A. H. Stuart, Newell W. Ellison, Richard S. Goldman and Edward Miller were with him on the brief) for Appellant Hiram Walker, Incorporated.

Robert S. Marx (Ralph T. Heymsfeld, George R. Beneman, Ira C. Rothgerber, Rothgerber & Appel, and Nichols, Wood, Marx & Ginter were with him on the brief) for Appellant Schenley Distillers Corporation.

George B. Haddock, Special Assistant to the Attorney General (Don W. Marshall, Special Attorney, Wendell Berge, Assistant Attorney General, and Thomas J. Morrissey, United States Attorney, were with him on the brief) for Appellee.

Gail L. Ireland, Attorney General, H. Lawrence Hinkley, Deputy Attorney General, Duke W. Dunbar, First Assistant

Attorney General, and George K. Thomas, Assistant Attorney General, were on the brief of Amicus Curiae.

Before PHILLIPS, BRATTON and MURRAH, Circuit Judges.

BRATTON, Circuit Judge:

The indictment herein containing two counts was returned against twenty-nine corporations and fifty-four individuals. The first count charges a conspiracy to raise, fix, and maintain the wholesale prices of spirituous liquor and wine shipped into Colorado, and the second charges a like conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into that state, in restraint of commerce among the several states and in violation of section 1 of the Anti-Trust Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U.S.C.A. § 1. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association whose members are wholesalers doing business in the state, hereinafter referred to as Wholesale Association; and one is a retail association whose members are retailers engaged in business in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. Demurrers and motions to quash the indictment were denied. United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n., 47 F. Supp. 160. Thereafter the United States elected to stand on the second count, and the first was dismissed. The defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each

entered a plea of nolo contendere and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, separate appeals were perfected, and by stipulation the several appeals were presented on a single record.

The second count defines certain terms and delineates the facts with respect to the several defendants being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of the state; that thus wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that approximately 1,150,000 gallons of spirituous liquor produced elsewhere are shipped into the state annually for such sale and distribution; that such liquor constitutes more than ninety-eight percent of all liquor consumed within the state; that approximately 800,000 gallons of wine produced in other states are shipped into Colorado annually for sale and distribution to the consuming public; that such wine constitutes more than eighty percent of all wine consumed therein; that substantial amounts of beer produced in other states are shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately 28 wholesalers; that more than seventy-five percent of the spirituous liquor and wine and substantial quantities of the beer are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of the beer, sold and distributed by the

bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of defendant Package Association. It then alleges that beginning in or about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, that the defendant associations, wholesalers, and retailers agree upon and undertake a program to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into Colorado and to establish in and by such contracts, high, arbitrary, and artificial retail prices embodying the high, arbitrary, and non-competitive margins of profit agreed upon, that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association, agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so, that the defendant retailers, through the defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to

enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit agreed upon, that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them, agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups, and margins of profit, and threaten to and do institute or cause to be instituted legal proceedings against retailers who fail or refuse to observe such prices, mark-ups, and margins of profits, that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices, mark-ups, and margins of profit lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers, that the defendant retailers threaten to and do boycott wholesalers and producers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit, that to finance such activities the defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the defendant Wholsale Association and that defendant in turn to pay a portion of such proceeds to the defendant Package Association, that in order to reduce price competition among retailers, defendant retailers attempt to persuade and induce the authorized officials of Colorado and of the City and County of Denver to reject applications for retail liquor licenses, and that such fair trade agreements be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amend-

ment to the Anti-Trust Act; that the effect of the combination and conspiracy has been to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to and approved by the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the defendant Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts; and that the combination and conspiracy was entered into and carried out in part within the District of Colorado, and further that many of the acts and things were done there.

An indictment is not fatally infirm for vagueness, indefiniteness, and uncertainty if it charges all of the essential elements of the offense in such manner as to advise the accused of the nature and cause of the accusation against him, and to enable him to prepare his defense and plead the judgment of conviction or acquittal in bar to a subsequent prosecution for the same offense. Evans v. United States, 153 U.S. 584; Cochran and Sayre v. United States, 157 U.S. 286; Rosen v. United States, 161 U.S. 29; Bartell v. United States, 227 U.S. 427; United States v. Behrman, 258 U.S. 280; Wong Tai v. United States, 273 U.S. 77; Hagner v. United States, 285 U.S. 427; United States v. Safeway Stores, — F.(2d) —. This count charges in general language the essential elements of the offense sufficiently for such purposes. And if the means of effectuating the conspiracy are not set out with the required detail and particularity, the remedy is to apply for a bill of particulars. Glasser v. United States, 315 U.S. 60; United States v. Safeway Stores, supra.

In a case of this kind there is jurisdiction either in the district where the conspiracy was formed or in the district where some act was done pursuant to it. The allegations that the con-

spiracy was entered into and carried out in part within the District of Colorado and that the defendants did within that district many of the acts charged were sufficient for jurisdictional purposes to lay venue there. Hyde v. United States, 225 U.S. 347; Brown v. Elliott, 225 U.S. 392; United States v. Trenton Potteries, 273 U.S. 392; United States v. Socony-Vacuum Co., 310 U.S. 150; United States v. Safeway Stores, supra.

The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. Hayes v. United States, 112 F.(2d) 417; Washington Brewers Institute v. United States, 137 F.(2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states, unfettered by the Commerce Clause. Ziffrin, Inc. v. Reeves, 308 U.S. 132; Cf. Carter v. Virginia, — U.S. —. In this connection, Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated of 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or advertise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose

of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful wilfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act; section 29 provides for a manufacturer's license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1(3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale deader, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. Appellants point with emphasis to these statutes and regulations as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in Washington Brewers Institute v. United States, Supra, that significantly no state had appeared as a friend of the court to protest the enforcement of the Anti-Trust Act, the Attorney of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United

States, and that they are subject exclusively to the control and operation of the law of Colorado.

Aside from the diminution pro tanto which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, Congress has plenary power under the Commerce Clause to regulate commerce among the several states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade or the exercise of the power of Congress over it in such manner as to make the regulation of them necessary or appropriate for the protection of the free flow of interstate commerce. United States v. Darby, 312 U.S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Anti-Trust Act, without regard to whether the prices or price structure agreed upon are reasonable or otherwise, United States v. Trenton Potteries, supra; Ethyl Gasoline Corp. v. United States, 309 U.S. 436; United States v. Socony-Vacuum Oil Co., supra; United States v. Masonite Corp., 316 U.S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce or which by its operation necessarily impedes the due course of such commerce comes within the act, Coronado Coal Co. v. United Mine Workers, 268 U.S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting intrastate activities is met with the condemnation of the act, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U.S. 37; Local 167, International Brotherhood of Teamsters v. United States, 291 U.S. 293; and one primarily local likewise finds itself within the ambit of the act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce, Indus-

trial Ass'n. v. United States, 268 U.S. 64. But a combination or concert, express or implied, limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the act, even though there may be an indirect and insubstantial effect on interstate commerce. United Mine Workers v. Coronado Coal Co., 259 U.S. 344; United Leather Workers v. Herkert, 265 U.S. 457; Industrial Ass'n. v. United States, supra; Levering & Garrigues Co. v. Morrin, 289 U.S. 103.

The gist of the offense charged in the second count is the agreement or confederation, in violation of the Anti-Trust Act. Dealy v. United States, 152 U.S. 539; Williamson v. United States, 207 U.S. 425; Braverman v. United States, 317 U.S. 49; United States v. Safeway Stores, supra. And the offense cannot be charged in the general language of the statute. The indictment must descend to particulars and charge the constituent ingredients of which the offense is composed. It is not enough to charge in general language that a conspiracy was formed to raise, fix, and maintain retail prices, by raising, fixing, and stabilizing retail mark-ups and margins of profit in restraint of commerce among the states. A general charge of that kind in the language of the statute would not suffice. United States v. Safeway Stores, supra.

Obedient the necessity of doing so, the indictment descends to particulars and undertakes to charge the essential elements of which the offense is composed. But the agreement as pleaded is essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line com-

ing into the state, and the required stamps must be affixed by the wholesaler. And when it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. Industrial Ass'n. v. United States, supra; Walling v. Jacksonville Paper Co., 317 U.S. 564; Higgins v. Carr Bros. Co., 317 U.S. 572; Jewel Tea Co. v. Williams, 118 F.(2d) 202; Jax Beer Co. v. Redfern, 124 F.(2d) 172; Walling v. Goldblatt Bros., 128 F.(2d) 778; Allesandro v. C. F. Smith Co., 136 F.(2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. Jewel Tea Co. v. Williams, supra.

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373; Local 167, International Brotherhood of Teamsters v. United States, supra. But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or remote is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower

than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Anti-Trust Act for the reason that, as previously said, retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are intrastate transactions.

The second count is completely barren of any allegations of fact effectively showing that the combination and agreement operated directly and substantially to restrict or burden the free and untrammeled flow of interstate commerce. The combination as pleaded was one intended to affect only intrastate activities. Its objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Anti-Trust Act.

The judgments are severally reversed and the causes remanded with direction to dismiss the indictments as to these appellants.

A true copy.

Attest:

ROBERT B. CARTWRIGHT, Clerk
United States Circuit Court of Appeals, Tenth Circuit
[Seal] By GEORGE A. PEASE, Deputy Clerk.